United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
MALCOLM A. HOFFMANN

76-7631

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

ORECK CORPORATION,

Plaintiff-Appellee,

—v.—

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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Counter-Statement of the Issues Presented for Review

1. Does not the record support the trial court's holding that defendants failed to overcome the burdens required to set aside the jury verdict?

2. Does not the record support the jury's verdict that defendants conspired to exclude or eliminate plaintiff from the United States and Canadian markets for vacuum cleaners?

3. Does not the record support the jury's verdict that the conspiracy described in (2) unreasonably restrained trade in violation of Section 1 of the Sherman Act?

4. Does not the record support the jury's assessment of damages caused by the conspiracy in restraint of trade?

Counter-Statement of the Case

The jury trial before Judge Owen of the Southern District of New York began on June 14, 1976 and ended 18 trial days later on July 8, 1976. The jury found that defendants conspired to restrain trade in violation of Section 1 of the Sherman Act (15 U.S.C. §1) and that plaintiff was damaged in the amount of $750,000 before trebling (A. 957-58).* On July 13, 1976, the judge entered judgment awarding plaintiff treble damages of $2,250,000 (A. 37-39).

On December 7, 1976 Judge Owen by memorandum opinion denied defendants' motion for judgment notwithstanding the verdict, or alternatively for a new trial, ruling as follows (A. 44):

> This motion is denied in all respects. The jury verdict has sufficient support in the record and may not be set aside. *Lebrecht* v. *Bethlehem Steel Corp.*, 402 F.2d 585, 589 (2d Cir. 1968). So ordered.

Defendants' joint brief nowhere even acknowledges the existence of this ultimate conclusion of the district court. It is, of course, from this crisp decision denying them judgment notwithstanding the verdict or a new trial that appeal must lie. Instead, the brief premises that this Court somehow is bound to accept defendants' factual version of the conspiracy, its restraining effect and the damages award, resolving all conflicts and drawing all inferences in defendants' favor. What defendants fail to consider are the facts as found by the jury. Perhaps this approach to the briefing is designed to persuade this Court that the ap-

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* The following abbreviations are used to refer to the record:
—Reference to a page of the Joint Appendix "(A. ___)"
—Reference to plaintiff's or defendants' exhibit, with parallel citation to exhibit volume of Appendix "(PX ___ or DX ___, E ___)"
—Reference to trial transcript page not included in Appendix "(Tr. ___)."

peal raises issues other than those going to the weight of the evidence. The reality, however, is that the appeal raises only garden-variety issues of fact reasonably found by the jurors.

In short, defendants are now by verbal magic attempting to make the 18 days of trial, 1880 pages of trial transcript and most of some 100 trial exhibits disappear. They now rely almost entirely upon strained versions of disputed facts which the jury expressly rejected and which are refuted by "evidence of substance" which wholly supports the jury's verdict. *Binder* v. *Commercial Travelers Mutual Accident Ass'n,* 165 F.2d 901 (2d Cir. 1947).

Plaintiff Oreck Corporation ("Oreck") was incorporated in 1963 by David Oreck. Prior thereto Mr. Oreck had supervised vacuum cleaner sales as Executive Vice President of Bruno, New York, which proved itself, among the many distributors of Whirlpool-brand vacuum cleaners, by far the most successful (A. 50-52, 55, 466-67). This achievement led Jack Sparks, vice president of Whirlpool Corporation, to propose that Mr. Oreck act as the exclusive distributor for Whirlpool-brand cleaners in the United States (A. 56-58, 467-71). Mr. Oreck accepted Mr. Sparks' proposal and Oreck served in that capacity from August 7, 1963 (PX 3, E1-9), until its termination as a distributor on December 31, 1971, creating and operating a nationwide system of vacuum cleaner distribution (PX 101, 102, E97-98).

Defendant Whirlpool Corporation ("Whirlpool") is an important manufacturer of vacuum cleaners and one of the largest manufacturers of electrical household appliances in the United States. Defendant Sears, Roebuck and Co. ("Sears") is the country's largest mail-order distributor of electrical household appliances and numerous other product lines. In its amended complaint filed September 6,

1972 (A. 7-20) Oreck charged defendants with violating Section 1 of the Sherman Act (15 U.S.C. §1) by conspiring to exclude or eliminate Oreck from the market for vacuum cleaners, attachments and parts in the United States (A. 7-14) and Canada (A. 14-15) and by conspiring to impose illegal restraints after sale on the product (A. 15-16). Whirlpool also was charged with discriminating in favor of Sears in violation of Sections 2(a) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §13) (A. 16-18), and with violating Section 7 of the Clayton Act (15 U.S.C. §18) (A. 18-19).

Only the Sherman Act claims were submitted to the jury. The trial court dismissed the Robinson-Patman claims in the course of Oreck's presentation on this issue and in face of Oreck's offer of proof (Tr. 1371-72),* and the remaining claims were withdrawn by Oreck's counsel before or during the trial.

Counter-Statement of the Facts

Nothing found in the "Statement of Facts" in the Defendants' Joint Brief (Brief 4-13) supports their contention that they are entitled either to judgment n.o.v. or a new trial. Their brief demonstrates that evidence of substance supports the verdict and that defendants' demand for a new trial merely seeks to overcome the losing effect of their unwillingness to call as a trial witness Whirlpool's John Payne, notwithstanding that he was present in the courtroom at the time Oreck concluded its case in chief and available to testify (Tr. 1648). Defendants failed to call Mr. Payne even though he was Whirlpool's official in charge of Whirlpool's relationship with Oreck during the critical time period involved in the litigation; it was Payne who dealt with Oreck in connection with such

* Oreck has not cross-appealed.

crucial matters as whether or not Oreck would be permitted to sell vacuum cleaners in Canada. He was the author of the devastating telegram which notified Oreck that it could not sell vacuum cleaners in Canada because Whirlpool could not get the approval of Sears, Whirlpool's Canadian franchise holder. Payne's telegram reads as follows (PX 34, E22):

> I regret to advise that I am unable to obtain a waiver to the current franchise to permit Canadian marketing.

When Payne was deposed by Oreck's counsel on July 8, 1974 he was asked about this language. Despite its utter clarity, Payne tried to repudiate it. He testified first that his choice of words "was in error" (A. 357) and that "it's a mistake on my part" (A. 359). Upon further examination, however, he was forced to admit that he first discovered this "mistake" when he met with his counsel during the preceding week (A. 362) and then that "my counsel advised me" of the mistake (A. 364).* These and other portions of Payne's deposition which were read to the jury made it clear that the "counsel" was Whirlpool's trial counsel (A. 355-64).

If there was anything Payne could have said useful to defendants it would seem that he most surely would have served as defendants' principal trial witness. Apparently he was not called to the stand because none of his testimony would have been favorable to defendants, but in any event

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* Defendants' reasons for not calling Payne also must have included the fact that he repudiated this passage found in his deposition testimony (Tr. 370):

> Q. Isn't it a fact, Mr. Payne that someone told you to say this, if you are asked a question about this phrase "waiver to the current franchise," to say that you mistakenly meant CSA approval? A. Yes.

When Payne "corrected" his deposition testimony some 18 months later he changed "yes" to "no" (Tr. 428-30).

it is clear that the credibility of his changed version of the Canadian conspiracy had been completely destroyed in the course of his deposition. It is also clear that defendants' failure to call Payne establishes the frivolity of their present contention that the jury's findings as to conspiracy must stand or fall on defendants' interpretation of a number of undisputed conversations between the two Orecks and Payne (Brief 13, 21-26). Its frivolity also is demonstrated by the fact that defendants did not object to the jury instruction describing the unfavorable inference created by their failure to call Payne (A. 916). It would be unspeakable to award defendants a new trial because of their unwillingness to call their only employee who might have controverted the testimony of the two Orecks and who, had there been any truth in the claim, might have demonstrated his lack of authority to deal with them.

Defendants' version of Mr. Payne's supposedly minor role in the conspiracy deliberately misstates other facts of record concerning him. For example, rather than being merely "a Whirlpool salesman who had no responsibility for matters of corporate policy" (Brief 21), Mr. Payne was the principal contact between Whirlpool and Oreck as Whirlpool's representative in charge of sales of special products (A. 105). Mr. Steeb, Payne's immediate superior (A. 857), admitted during his cross-examination that Payne was the man who dealt regularly with Oreck (A. 857), that Payne had the most contact with Oreck of anyone in the Whirlpool organization (A. 858), and that Payne was the man on the job for Whirlpool in its dealings with Oreck (Tr. 1529).

Defendants reveal that their appellate arguments are factual rather than legal in nature by arguing that all of their trial witnesses categorically denied that they participated in any conspiracy (Brief 12). Moreover, the

record fully supports the soundness of the jury's finding that defendants' trial witnesses lacked credibility because these categorical denials consisted almost entirely of "yes" and "no" answers to broad leading questions by defense counsel. The compliant witnesses were Whitman (A. 875-76), Wardeberg (A. 882-83), Harper (A. 868-69), Danhauer (A. 863-65), Steeb (A. 848-50), Smith (A. 839), Boyer (A. 830-32), Sparks (A. 809-10) and Sweet (A. 777-79). Typically, the following ensued during the direct examination of Whirlpool's John Steeb, Mr. Payne's superior (A. 848-49):

> Q. Did you at any time have any conversation or correspondence with anyone at Sears concerning Oreck being in the direct mail business? A. No, sir.
>
> Q. Did you at any time have any conversation or correspondence with anyone at Sears concerning Oreck's desire to sell in Canada? A. No, sir.
>
> Q. Did you ever have any correspondence or conversation with anyone at Sears concerning the prices charged by Whirlpool to Oreck for vacuum cleaners? A. No, sir.

Such leading questions were propounded almost verbatim to all of the remaining defense witnesses. The cross-examination established that the witnesses called by Whirlpool were but a few from a plethora of possible witnesses who had no reason to speak with Sears about anything, and who had little if any knowledge concerning Oreck's operations. One is reminded of an eighteenth century British cartoon depicting the following courtroom scene:

> *Complainant*: This man please your Worship broke into my grounds and stole a spade—I have brought a Witnefs who saw him take it.
>
> *Defendant*: And please your Worship I can bring Twenty Witnefses who did not see me take it.

> *The Court*: The Devil you can! —O' there never was a clearer case. —go about your businefs my friend— it is Twenty to one in your favor.

Finally, we submit that in each instance the testimony about the relationship between Whirlpool and Sears coming from defendants' witnesses was completely discredited or shown to have no meaning whatsoever (A. 780-97, 812-27, 833-34, 840-44, 851-59, 870-71, 877-79, 884).

Defendants also merely are arguing about the facts when they claim that "there is no competent evidence in the record that Whirlpool and Sears conspired to exclude Oreck from the vacuum cleaner market" and that Oreck "has totally failed to prove an unreasonable restraint of trade resulting therefrom" (Brief 14). Moreover, these factual arguments must fail because the jury had before it highly persuasive facts of record which established both the conspiracy and unreasonable restraint of trade. The record shows that although the original Oreck-Whirlpool distribution agreement of 1963 imposed upon Oreck the single limitation that it not solicit sales by "house-to-house canvassing" (PX 3, E1-9, par. 3), Whirlpool thereafter imposed many other severe limitations upon Oreck's business activities. The record shows that from 1963 through 1971 defendants restrained Oreck from competing with Sears on vacuum cleaner sales in terms of (1) price competition, (2) mail order business, (3) private label sales, and (4) Canadian sales. The record also shows that at various times from 1963 through 1971 Whirlpool was guilty of irrational economic behavior against its own self-interest which created very strong inferences of both conspiracy and unreasonable restraint.

(1) *Oreck's Price Competition With Sears Was Restrained.*

The jury's findings of conspiracy and restraint must be placed in the context of an unprecedented intimate working relationship between Sears and Whirlpool which began in 1925 when they entered into a "gentlemen's agreement" whereunder Sears purchased two-thirds of Whirlpool's total annual production of 7,500,000 units (A. 340-41). Elisha Gray, the Chairman of Whirlpool's Board of Directors, stated that a formal written contract was considered to be unnecessary because both companies felt that the "flavor" of the relationship would change "if based on legal technicalities rather than merit" (A. 340-41, 497-98). This extraordinarily close business relationship became a key fact of record during the trial in part because "An Appraisal of Vacuum Cleaner Business RCA Whirlpool" written by H. Thomas Stroop of Whirlpool on October 16, 1961 graphically spelled out Whirlpool's desire to shield Sears from price competition in the marketing of vacuum cleaners (PX 160, E127-69 at E141):

> Sears becomes very unhappy if RCA WHIRLPOOL product is retailed for less than the Sears product manufactured by Whirlpool. For this reason, we understand it has been decided that the RCA WHIRLPOOL brand should have retail prices that our [*sic*] comparable to Sears.
>
> Our challenge then . . . "Can we sell cleaners in volume at high retail prices . . . and if so, how?"

Whirlpool's objective of maintaining "high retail prices" favored by Sears was a key fact of record even aside from the unprecedented oral "gentlemen's agreement". For one thing, in 1925 Sears bought a substantial block of common stock in Whirlpool's corporate predecessor (A. 323) and by 1960 Sears was one of the largest, if not the largest,

owner of Whirlpool's common stock, owning some 251,192 shares (A. 322). For another thing, throughout this 50-year period there was a continuing shuttling of Whirlpool and Sears officers back and forth between the boards of directors of the two companies, and over the years many officers of both companies served as interlocking directors (A. 333-36).

Other facts of record also established that it was Whirlpool's objective to confine Oreck's distributorship to a higher-priced line of vacuum cleaners which would in no way compete with Sears' units (A. 73-75, 498-91; Tr. 653-54, 683). At the very outset of the Oreck distributorship relationship in 1963, Whirlpool vice president Jack Sparks gave David Oreck this explicit direction (A. 75):

> We were advised—I was advised by Mr. Sparks that I was not to conflict with Sears on low price points; I was to sell high price merchandise and Sears would sell the low price and I was advised that we would have a product that looked different from theirs. I was told that I was simply not to conflict with Sears Roebuck on price, appearance, any thing like that.

A letter from James Bourquin of Whirlpool dated June 14, 1963 directed that Oreck's vacuum cleaners not clash esthetically with those sold to Sears (PX 11, E10-11). An interoffice Whirlpool memorandum dated June 27, 1966 put it this way (PX 45, E39-40):

> . . . Suffice it to say that we must maintain our perspective as to why we were originally interested in this Oreck venture—what 20,000 units does or doesn't do for us compared to 550,000 for Sears . . . .

Whirlpool's objective of preventing price competition between Sears and Oreck had been achieved in significant part by 1967. By then Oreck found it impossible to com-

pete with Sears in the higher-priced line, and it was forced to sell through direct mail and to institutional supply houses in order to cut out the middleman, lower costs and otherwise enable Oreck to compete price-wise with Sears (A. 200-01, 309-10).

(2) *Oreck's Mail Order Competition With Sears Was Restrained.*

After Oreck's entry into the direct mail business in 1967 its sales increased dramatically from 8,384 units in 1967 to 15,610 units in 1968 and a high of 78,500 units in 1971 (PX 106, E102), and Oreck's sales for upright vacuum cleaners actually surpassed Sears in volume (A. 426).

Joint retaliatory action by Whirlpool and Sears was swift, the former serving the latter's interest. In 1967 Whirlpool's John Payne told David Oreck not to "rock the boat" and to terminate its mail order business because the "other customer did not like it" (A. 207). Whirlpool's only "other customer" was Sears (A. 175, 207, 262-63, 638). Then Whirlpool's Jack Sparks and Sol Sweet told David Oreck that selling by mail order was a "mistake" (A. 501, 505), and within a year Whirlpool terminated Oreck's distributorship agreement (A. 170). When David Oreck asked Payne what happened, Payne responded (A. 175):

> Dave, I hesitate to tell you this because it could cost me my job, but I think our other customer got to the head of the company.

Only by threatening to sue Whirlpool was David Oreck able to negotiate a three-year extension of the distributorship agreement (PX 44, E29-38).

Sears' role in the 1968 termination of Oreck and its interference with Oreck's mail order program also con-

tributed significantly to Whirlpool's decision to cut Oreck off in 1971. Sid Boyar—who during the critical period 1965-1972 was both a Sears vice president and a Whirlpool director (A. 335)—forwarded an Oreck mail solicitation to Don Ranum of Whirlpool in April of 197[illegible] (A. 330) and Ranum in turn sent it to John Platts of Whirlpool with this covering note (PX 60, E53-69):

> . . . [W]e got a letter from Sid Boyar in which he forwarded a letter from an old friend of Whirlpool who had received an Oreck offer and also thought this type selling would give Whirlpool a bad name.

In its answers to interrogatories Sears identified the "old friend of Whirlpool" as J. M. Barker, "an Honorary Director of Sears" (A. 330). Thomas L. Smith of Sears testified that he saw Oreck mail solicitations in 1970 or 1971 (A. 566, 583, 584) and that, in counterpoint, Whirlpool never attempted to stop Sears' direct mail solicitations, admitting that to have done so "would be very odd to say the least" (A. 569).

Defendants assert that Oreck was terminated because its mail order solicitations were of "questionable validity", damaging Whirlpool's "good name" (Brief 20, 26). However, admissions by Whirlpool's witness Sparks show exactly the contrary. During his cross-examination Sparks answered in the negative when asked if Oreck was terminated because of "misrepresentations or poor public relations statements or diminishment of the name of Whirlpool resulting from the [mail order] activities of Oreck Corporation as a Whirlpool Distributor" (A. 483).

The foregoing facts of record directly refute defendants' claim that Sears played no part in and indeed had no knowledge of Whirlpool's termination of the Oreck franchise, but still other important facts of record showed that

throughout the critical time period 1963-1971 defendants frequently had the opportunity to have high-level sales discussions about the Oreck franchise and its termination. For example, Sears' Smith testified that Sears' Executive Vice President for Sales, Button, met in 1971 with Whirlpool's Group Vice President, Upton (A. 571-73), who had "overall responsibility" for Whirlpool's relationship with Sears (A. 883-84), to review Whirlpool's entire line of merchandise including vacuum cleaners and "be updated on their history and their plans for the future" (A. 572). The "plans" extended beyond the December 31, 1971 termination of Oreck (A. 574).

(3) *Oreck's Potential for Private Label Competition With Sears Was Eliminated.*

On several occasions David and Marshall Oreck asked Whirlpool's Payne to make vacuum cleaners for private-label customers (A. 257-58, 264, 634-35; PX 78, 79, 81, E 84-89; E88; PX 81, E89). Both testified that such production would have required no changes in models already produced for Oreck (A. 262-63, 635, 657-59) and that Whirlpool initially considered honoring these requests (PX 79, E88).

Oreck made its first request in June 1967 when Marshall Oreck asked Payne about getting private-label manufacture of the AP-18 attachments for Airway Sanitizer of Toledo (A. 625-26). Initially, Payne was very enthusiastic. He said it would be a marvelous way to increase business (A. 626), and that he expected to have price quotations very shortly (A. 626-27). However, this first effort to obtain private-label vacuums came to a halt in early 1968 when Payne told Marshall Oreck that "corporate had decided not to quote on this and not to make a private label for us" (A. 629).

Later in 1968 David Oreck received numerous inquiries about the production of private-label vacuum cleaners from Rex-Air, Dustex and other companies (A. 259-60), but when he asked Payne to make a private label vacuum cleaner Payne responded (A. 263):

> Dave, I want to tell you as a friend, don't rock the boat. We have objections here from our customer [Sears] about giving you private label and if you persist on asking this it's only going to cause you trouble.

Payne later rejected other requests for the private label manufacture of vacuum cleaners made by David Oreck (A. 264-65) and by Marshall Oreck (A. 635). Oreck nonetheless persisted in requesting private-label manufacture as orders came in from potential customers (A. 636-38) until Payne told Marshall Oreck in September 1971 (A. 637) that "another vacuum cleaner customer [Sears] said they are not interested in having another competitor in the vacuum cleaner business" (A. 638).

(4) *Oreck's Potential for Canadian Competition With Sears Was Eliminated.*

The record shows that Sears marketed its vacuum cleaners in Canada through Simpson-Sears Ltd. (A. 135, 538-39, 562-64) and that Whirlpool and Sears began to conspire to exclude Oreck from the Canadian market in June 1966 after David Oreck inquired about the making of Canadian sales (A. 131). On June 1, 1966 Whirlpool's Don Galloway told Oreck that he could not solicit orders for Whirlpool vacuum cleaners in Canada (A. 121-22) and Payne told him the same thing (A. 125-26). Whirlpool's Sol Sweet made the handwritten notation on Don Galloway's note of June 3, 1966: "Do not want to get involved at this time with distribution of this product in Canada" (PX 26, E13-15).

Thereafter Whirlpool furthered the conspiracy by stubborn refusals to obtain Canadian Standard Association's ("CSA") approval (A. 353, 387)* and to make the trivial design changes necessary to meet CSA standards (A. 130-33, 151, 154). Payne encouraged David Oreck, and Whirlpool's Sweet and Woolridge said that they would look into CSA approval (A. 152-53), but Whirlpool never thereafter submitted the CVR 2000 vacuum cleaner for such approval (A. 131). John Payne admitted that Whirlpool's corporate management—John Steeb—told him not to make the changes necessary for CSA approval (A. 354, 362-63), and in a telegram to David Oreck, Payne expressed regret that "I am unable to obtain a waiver to the current franchise to permit Canadian marketing" (PX 34, E22; A. 356-67). The only reasonable explanation on the evidence was that it was Sears' "current franchise." (The coached effort to repudiate this explanation is described at pages 5-6 above.)

Obtaining CSA approval for Oreck's vacuum cleaners would have been easy for Whirlpool because it already had obtained CSA approval for Sears' counterparts of the Oreck CVR series (A. 134-35). In a Whirlpool memorandum dated June 27, 1966, the following two consecutive paragraphs bared Whirlpool's true purposes (PX 45, E39-40):

> . . . Suffice it to say that we must maintain our perspective as regards why we were originally interested in this venture—what 20,000 [Oreck] units does or doesn't do for us compared to 550,000 for Sears—how much management attention we can justify for the profit involved, etc.
>
> P.S. Needless to say, we shouldn't consider for a moment authorizing Oreck to operate in Canada.

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* Like Underwriters Laboratory ("UL") approval in the United States, such CSA approval was necessary for successful Canadian marketing of vacuum cleaners (A. 387).

(5) *Whirlpool's Economically Irrational Behavior Was Highly Probative of Conspiracy and Unreasonable Restraint.*

The jury also had before it highly probative evidence of Whirlpool's economically irrational behavior supportive of the inferences of conspiracy and unreasonable restraint. Perhaps the most dramatic example was the evidence that Whirlpool terminated Oreck's franchise in 1968 and again in 1971 even though it was an extremely profitable operation for Whirlpool.

Directly contrary to defendants' present claim that Oreck was terminated because it was "unprofitable" (Brief 8-9, fn. 2), Whirlpool's own witnesses freely admitted that as of 1968 and 1971 Oreck had been very successful in promoting and selling Whirlpool vacuum cleaners (PX 47, E44; PX 51, E48-49; PX 52, E50). Steeb admitted that Oreck was "doing a nice job, no question about that" (A. 552). Sparks admitted that during 1968-71 Whirlpool was "making a profit" on Oreck's sales (A. 489) and that "we had no argument with the amounts he was selling" (A. 488). Payne admitted that he had no dissatisfaction with the size of Oreck's 1968 sales, that "I had excellent relations with the Oreck people" (A. 515) and that he had hoped Oreck would be continued after 1971 (A. 517). Payne wrote as follows to Oreck during the seventh year of its distributorship in 1969 (PX 46, E41-43):

> . . . It appears that during the month of January, 1970 we will ship the 100,000th electric cleaner into your distribution system. Congratulations on achieving this historic milestone.

Indeed, Whirlpool's irrational economic behavior continued even after the termination of Oreck's contract at a cost to Whirlpool's stockholders of almost a million dollars. Whirlpool refused to sell Oreck the 38,000 Oreck

units in inventory as of December 31, 1971 even though Oreck offered to pay in cash the full unit price of $30 (A. 299, 491-92, 495-96, 518, 521-22, 544-46). Whirlpool instead sold this inventory to Western Auto and Mastercraft for about $15 per unit (A. 546, 555-56). Whirlpool's loss totaling almost one million dollars included storage charges, expenses for changing cartons and lost carton sales (A. 523; PX 103, E99; PX 104, E100-01).

An example of Whirlpool's irrational behavior during the life of the Oreck contract was its willingness to design a parcel-post package to accommodate a knockdown version of Sears' upright vacuum cleaner (A. 610) but unwillingness to comply with Oreck's request for a comparable package with a knockdown handle satisfying parcel post and UPS requirements for distributing Oreck's CVR 2000 and LV551 (A. 601-02). Payne submitted Oreck's request to his superiors and stated that there would be no problem (A. 604) and that it was just a matter of working it into the next production schedule (A. 606). However, he later advised Marshall Oreck (A. 609):

> [Corporate said] they are not interested in providing you with a carton and it's in your best interest leaving this matter alone. It's sensitive with Corporate and do not make any changes; leave this matter alone.

In context of these facts the jury fairly could infer that what was "sensitive" to "Corporate" was in fact the interests of Sears.

The jury could also fairly infer the existence of conspiracy from the peculiar fact that Whirlpool's representatives identified Sears as its "other customer" instead of by its company name during their conversations with David and Marshall Oreck (A. 175, 207, 262-63, 638). Indeed, the initial agreement between Whirlpool and Oreck

contained a provision releasing Whirlpool from liability for failures to fulfill Oreck's orders because of "the demands of other Whirlpool customers" (PX 3, E1-9, par. 7). That such "other customer" was in fact Sears was obvious to the jury because Sears was Whirlpool's only "other customer" for vacuum cleaners when Oreck was also a distributor, and at all other relevant times Sears was the sole customer (A. 72, 508).

ARGUMENT

POINT I

The trial court correctly held that defendants failed to overcome the burdens imposed upon movants seeking judgment n.o.v. or a new trial.

The trial court cited *Lebrecht* v. *Bethlehem Steel Corporation,* 402 F.2d 585 (2d Cir. 1968) in support of its ultimate conclusion that "the jury verdict has sufficient support in the record and may not be set aside" (A. 44). This Court held in *Lebrecht* (402 F.2d at 589):

> . . . Only when there is no "evidence of substance" upon which reasonable men could reach the result represented by the verdict is the trial judge empowered to set aside the verdict and enter judgment n.o.v. for the moving party. Binder v. Commercial Travelers Mutual Accident Association, 165 F.2d 896 (2d Cir. 1947). It is hornbook law that when a motion is made to set aside the verdict, the trial court, as well as the appellate courts, must view the evidence in the light most favorable to the nonmoving party, and must give that party "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696, 82 S. Ct. 1404, 1409, 8 L. Ed. 2d 777 (1962).

The trial court's holding also is fully supported by this Court's ruling in *Armstrong* v. *Commerce Tankers Corp.*, 423 F.2d 957, 959 (2d Cir.), *cert. denied,* 400 U.S. 833, 91 S. Ct. 67 (1970):

> . . . The motion [for judgment n.o.v. or a new trial] will be granted only if (1) there is complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment could not arrive at a verdict against them. . . .

These propositions are dispositive of this appeal because all of defendants' present arguments erroneously premise that a court of appeals ought to retry the facts without giving any weight to the jury's findings. The law, of course, is to the contrary. As the Supreme Court stated in *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29, 35, 64 S. Ct. 409, 412 (1944):

> The very essence of its [the jury's] function *is to select from among conflicting inferences and conclusions that which it considers most reasonable.* . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. [Emphasis added.]

In *Lebrecht* this Court used the italicized language above to describe "the basic function of the jury" (402 F.2d at 589). See also, *Simblest* v. *Maynard,* 427 F.2d 1, 4 (2d Cir. 1970).

POINT II

The jury's finding of a conspiracy was supported by substantial evidence.

A. *There Was Substantial Evidence From Which the Jury Could Find a Conspiracy.*

There was abundant evidence of conspiracy introduced at trial (*supra*, pp. 9-18) from which the jury could have found a conspiracy between defendants to exclude plaintiff from the sale of vacuum cleaners in the United States and Canada.

Defendants argue that the jury's verdict must be overturned because Oreck failed to prove a contract, combination or conspiracy (Brief 21). The conspiracy was amply proved and the argument erroneously premises that the conspiracy charge must be evaluated in light of particular fragments of proof selected by defense counsel rather than in light of the entire record available to the jury. The law of conspiracy is to the contrary. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *U.S.* v. *Patten*, 226 U.S. 525, 544, 33 S. Ct. 141, 145 (1913). As was stated in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 1410 (1962):

> . . . [P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . .

In the trial of an antitrust case, "[i]t is elementary . . . that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually

done. . . ." *Eastern States Retail Lumber Dealers' Assn.* v. *United States,* 234 U.S. 600, 612, 34 S. Ct. 951, 954 (1914). And it is entirely proper for a jury to base a finding of Sherman Act §1 conspiracy upon "a development and collation of the circumstances." *Loew's, Inc.* v. *Cinema Amusements,* 210 F.2d 86, 93 (10th Cir.), *cert. denied,* 347 U.S. 976 (1954).*

The Supreme Court has expressly rejected defendants' theory that the evidence—after dismembering—fails to support the finding of a Sherman Act §1 conspiracy. *Interstate Circuit* v. *United States,* 306 U.S. 208, 59 S. Ct. 467 (1939). Characterizing that theory as "an elaborate argument, based on the minutiae of the evidence, that other inferences are to be drawn" (306 U.S. at 223, 59 S. Ct. at 473) the Court upheld the finding of a Sherman Act §1 conspiracy based on the circumstantial evidence presented at trial.

The rule is well established in this circuit that if a jury reasonably infers the existence of a Sherman Act §1 conspiracy, the jury's finding should not be set aside on appeal because the jury might have inferred something else. As was held in *Bordonaro Bros. Theatres* v. *Paramount Pictures,* 176 F.2d 594, 597 (2d Cir. 1949):

> Defendants, in urging that the jury should not have been permitted to draw the inferences of combined and concerted action against plaintiff which it obviously did, state a standard of proof which we have rejected even in criminal cases. Where more than one

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* "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age." TNEC Monograph No. 16 (1941) 15.

> inference can reasonably be drawn from the proof, it is for the jury to determine the proper one; the burden of proof of the entire care resting upon the plaintiff does not mean that the court should so far encroach upon the province of the jury as to require that one inference should be more thoroughly proven than another if both are reasonable and rational.

Whirlpool's irrational business behavior was another circumstance from which the jury could properly infer agreement. *Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 346 U.S. 537, 74 S. Ct. 257 (1954). In *Theatre Enterprises*, the Court expressly held that "business behavior"—not justifiable by independent judgment—"is admissible circumstantial evidence from which the fact finder may infer agreement." 346 U.S. at 540, 74 S. Ct. at 259. Whirlpool's economic irrationality (outlined above at pp. 16-18) was circumstantial evidence from which the fact finder could properly infer conspiracy.

B. *The Payne Conversations—Probative of a Sherman Act §1 Conspiracy Between the Two Defendants—Were Properly Admitted Into Evidence.*

(1) Defendants Failed to Call Payne as a Witness.

Defendants' second and more narrow attack on the evidence of conspiracy (Brief 21-26) is aimed at erasing the effect of the words of John Payne, the Whirlpool "product manager" for vacuum cleaners (A. 577), in six conversations with the two Orecks in which Payne "blew the whistle" on Sears in the conspiracy as found by the jury.

All of defendants' attempts to discredit evidence of Payne's conversations must be studied in the light of the fact that defendants had Payne available to them, present in the courthouse (Tr. 1648), and yet defendants failed to call Payne—Whirlpool's own employee—as a witness.

Judge Owen, relying on settled authority, treated Whirlpool's failure to call Payne as a fact supportive of the inference that Payne's testimony would have been *un*favorable to Whirlpool. The trial court so instructed the jury (A. 916). The propriety of this instruction is not now challenged, and therefore the inference that Payne's testimony would have been unfavorable to defendants is unassailable here.

As was stated with respect to a comparable situation in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 228, 59 S. Ct. 467, 474 (1939) (affirming finding of Sherman Act §1 conspiracy):

> . . . The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. . . . Silence then becomes evidence of the most convincing character. . . .

(2) The Payne Conversations Implicated Sears in a Conspiracy With Whirlpool.

On direct examination, David Oreck testified that he had a telephone conversation with Payne in "late 1967" in which Payne cautioned Oreck to drop his direct mail sales program—"not to rock the boat"—because "the people," meaning "the other customer, didn't like it" (A. 207). The *only* objection defendants made to this testimony was as to "the time period" (A. 207).

Also on direct examination, David Oreck testified that a day or two after he learned from Whirlpool in June, 1968 (A. 169) that his distributorship contract was to be terminated, Oreck telephoned John Payne to ask him why:

> And I said, "John, you have been a friend of mine, we worked together for a long time. What happened here? Where did I go wrong?"
>
> He said, "Dave, I hesitate to tell you this because it could cost me my job, but I think our other customer got to the head of the company" (A. 175).

Defendants objected to this evidence, but only on the ground that it "is simply a statement of opinion by someone else" and therefore "improper" (A. 175).

Also on direct examination, David Oreck testified that he had a third telephone conversation with Payne "in the latter part of 1968" (A. 262) during which Oreck asked Payne why Whirlpool would not make private label sales through Oreck to Rexair:

> His answer to me at that time was, "Dave, I want to tell you as a friend, don't rock the boat. We have objections here from our customer about giving you private label and if you persist on asking this it's only going to cause you trouble" (A. 263).

Defendants objected to this evidence without specifying the specific grounds for their objection (A. 263).

During the trial, plaintiff read into the record portions of a deposition in which Marshall Oreck testified that around "November, 1969" (A. 649-50) and also "in 1970" (A. 652) he had telephone conversations with Payne during which he asked Payne why Whirlpool would not produce private label vacuum cleaners for Oreck:

> When I asked the reason why, he said, "Our other vacuum cleaner account objected to that."
>
> When I asked who that might be, he said, "The other vacuum account." He just repeated it (A. 651).

Defendants objected to this evidence, arguing that it went "beyond the scope of cross" (Tr. 1060).

At trial, Marshall Oreck confirmed the accuracy of this evidence (A. 552-63), and also testified about a third such conversation he had with Payne in "September, 1971" (A. 637-38). In the September 1971 conversation, Marshall Oreck questioned Payne on Whirlpool's refusal to sell other private label vacuum cleaners to Oreck for resale to Rexair:

> He said that Corporate had turned him down, and I said, "I don't understand. You have the capacity to make them; you have all these machines; why can't I have them?" He said, "Because another customer objected."
>
> I said, "What other customer?"
>
> He said, "Another vacuum cleaner customer; they are not interested in having another competitor in the vacuum cleaner business" (A. 638).

Defendants' only objection to this testimony was as to its "time period" (A. 973-4). Marshall Oreck confirmed the accuracy of this testimony (A. 653).

(3) Testimony of David and Marshall Oreck Containing Evidence of Six Conversations With John Payne Was Admissible Under F. R. Evid. Rule 801(d)(2)(D).

In an attempt to escape the jury's finding of a conspiracy between Whirlpool and Sears, defendant baldly asserts, for the first time on this appeal, that John Payne was merely "a Whirlpool salesman who had no responsibility for matters of corporate policy . . . no responsibility for sales to Sears . . . no contacts with Sears" (Brief 21-22).

Defendants' argument that Payne was without "authority" to "speak for Whirlpool" is wholly without merit, since it erroneously premises a requirement that plaintiff "af-

firmatively" prove Payne's authority as a condition to using any evidence of Payne's statements (Brief 22). This argument is, in substance, a contention that evidence of an employee's statement—made during his period of employment and about the subject matter of his employment—is hearsay and as such is inadmissible against the employer.

David and Marshall Oreck testified as to six conversations they had with Payne, but this testimony is *not* hearsay under the Federal Rules of Evidence and thus was properly admitted below.

Rule 801(d)(2)(D) of the Federal Rules of Evidence provides in pertinent part that:

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . .

The law is now settled that

> Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as *it relates to a matter within the scope of the agency.* "[T]he authority to do an act would conclusively imply authority to speak narratively about the act, if the utterance was made before the termination of the agency." 4 *Weinstein's Evidence,* ¶801(d)(2)(D)[01] at 801-137 (footnotes omitted) (emphasis added).

These conversations with Payne occurred during Payne's tenure at Whirlpool and were integrally related to the subject matter of Payne's employment.*

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* Payne's corporate role in Whirlpool (see pp. 4-7, *supra*) shows that he was considerably more than a mere salesman. Payne was entrusted with confidential or sensitive information (PX 36, E 23). Payne acted as Whirlpool's spokesman in giving Oreck the news

The facts showing Payne's role in dealing with the Orecks as agent of Whirlpool give rise to a necessary inference—even under the older and traditional view—that Payne had authority to give the Orecks the *reasons* that Whirlpool refused to continue to make sales to them at the times Payne communicated his principal's refusals. *See, e.g., Wigmore on Evidence* §1078 (3d Ed. 1940).

In enacting Rule 801(d)(2)(D), the Advisory Committee relied upon the three cases which follow (*see, Advisory Committee's Note* to Rule 801(d)(2)(D) in 11 *Moore's Federal Practice* §801.01[6] at VIII-29):

In *Martin* v. *Savage Truck Line,* 121 F. Supp. 417 (D.D.C. 1954) (statement of dead truck driver that he was speeding admitted against his employer) the court said:

> To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over the public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when the accident occurs, for the purpose of truthfully relating the facts concerning the occurrence . . . seems to me to erect an untenable situation, neither contemplated by the parties nor sanctioned by public policy. *Id.* at 419.

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that Whirlpool would be unable to make Canadian sales under the franchise (PX 34, E 22; PX 37, E 24-25). Payne signed letters on behalf of "Whirlpool Corporation" (PX 46, E 41). Payne represented "Whirlpool" at out-of-town meetings (PX 75, E 82; PX 78, E 84-87). Payne declined wholesale vacuum cleaner orders on Whirlpool's behalf (PX 99, E 95) and also promoted vacuum cleaner orders (DX N, E 188) on its behalf.

Whirlpool's Steeb—Payne's immediate superior—admitted that Payne was "the man who dealt regularly with Oreck" on behalf of Whirlpool (A. 857), that Payne "had the most contact with Oreck . . . of anyone in the [Whirlpool] organization" (A. 858), and that Payne was "the man on the job" who dealt "for Whirlpool with Oreck Corporation" under Steeb's supervision (Tr. 1529).

In *KLM Royal Dutch Air Lines* v. *Tuller,* 292 F.2d 775 (D.C. Cir.), *cert. denied,* 368 U.S. 921 (1961), the court admitted an aircraft radio operator's statement against his principal that he had not sent a distress message.

In *Berwell* v. *Crist,* 373 F.2d 78 (3d Cir. 1967), the statement of a summer camp instructor to a policeman was accepted by the appellate court over the objection that the defendant camp directors had not authorized the instructor to make admissions.

The trustworthiness of Payne's words is highlighted here since Payne admittedly jeopardized his job by even speaking forthrightly with Marshall and David Oreck (A. 175).*

There is no case authority applying the federal rule which suggests that evidence of Payne's conversations should have been excluded.

(4) Defendants Are Precluded From Raising on Appeal This New Objection to Evidence of Payne's Conversations.

Defendants' new contention, raised for the first time on this appeal, that Payne was without "authority" to speak with the Orecks and convey information probative of the conspiracy comes too late for this Court's review. Rule 103(a)(1) of the Federal Rules of Evidence provides that:

> Error may not be predicated upon a ruling which admits or excludes evidence unless . . . a timely objection or motion to strike appears of record, *stating the specific ground of objection,* if the specific ground was not apparent from the context. . . . (Emphasis added.)

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* Payne's declarations are thus admissible on the additional and independent ground that they constitute statements "against interest" within the meaning of the Federal Rules of Evidence, Rule 804(b)(3).

At trial, defendants did not raise their belated contention. Nor was this objection "apparent from the context." *

The Federal Rules of Evidence codify well-settled case law which holds that "[a] specific objection overruled protects the record to the extent of the ground specified, but does not avail the party of other grounds that could have been raised." *Market Service, Inc.* v. *National Farm Lines,* 426 F.2d 1123, 1128 (10th Cir. 1970).

Defendants' specific objections** to the admission into evidence of Payne's conversations provide no basis for this Court to reverse on the new basis now urged.

POINT III

Abundant evidence of record supports the jury's determination that the Sears-Whirlpool conspiracy unreasonably restrained trade.

Defendants contend in their Point I (Brief 14-21) that any conspiracy to terminate Oreck's distributorship and to exclude it from the Canadian market did not result in "an unreasonable restraint of trade" (Brief 14). In so doing, defendants not only ignore the insurmountable burden of demonstrating that the jury's verdict was with-

* An objection "apparent from the context" is one where, for example, "the party is still relying on the ground of objection *previously urged.*" 10 *Moore's Federal Practice* §103.12 at I-25 (emphasis added). This proviso was added to the rules "so that repetitious statements of the *specific ground* of objection [would be] unnecessary where it [was] obvious." *Id.* at I-25 to I-26. Since no objection as to absence of agency or authority was made as to any testimony from either side during the entire trial, it is clear that such precise objection was nonexistent—and certainly not "apparent from the context."

** These objections were: "time period" (A. 207); "opinion" (A. 175); no ground specified (A. 263); "beyond the scope of cross" (Tr. 1060); "beyond the scope of cross" (Tr. 1060); "time period" (Tr. 973-4).

out any reasonable foundation (pp. 18-19, *supra*). They also seek to persuade this Court—in blatant disregard of the record—that the commercial context underlying this case involves merely the substitution of one dealer for another or a simple unilateral refusal to deal with the unfavored dealer. This argument is wholly without merit.

The facts found by the jury clearly show the conspiratorial elimination, reduction and foreclosure of Oreck's growing competitive viability both in the market for Whirlpool vacuum cleaners and in the vacuum market generally. Thus, "[w]e have here a classic conspiracy in restraint of trade: joint collaborative action . . . to eliminate [a competitor] by terminating business dealings." *United States* v. *General Motors Corp.*, 384 U.S. 127, 140, 86 S. Ct. 1321, 1328-29 (1966). Moreover, as shown above (pp. 9-18, *supra*), the elimination of Oreck from the marketplace was provoked in large measure because Oreck's mail order techniques created serious price competition for Sears. It is this competitive threat to Sears which is the real meaning of defendants' repeated assertions about Oreck's "getting back on the track" (Brief 5-8, 20). "There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. *Elimination, by joint collaborative action, of a discounter from access to the market is a per se violation of the Act.*" *United States* v. *General Motors Corp., supra,* 384 U.S. at 145, 86 S. Ct. at 1330 (emphasis added).

Indeed, if the Sears-Whirlpool conspiracy is viewed as a group boycott and hence a *per se* violation, this Court must disregard the entirety of defendants' Point I because the purported "reasonableness" of their actions is of no consequence. "There are certain agreements or practices

which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. R. Co.* v. *United States,* 356 U.S. 1, 5, 78 S. Ct. 514, 518 (1958). The Supreme Court has consistently held that group boycotts are *per se* violations of the Sherman Act. See the numerous cases cited in *United States* v. *General Motors Corp., supra,* 384 U.S. at 145-46, 86 S. Ct. at 1330-31.

Judge Owen recognized the *per se* concept by charging the jury that "the violations alleged by the plaintiff are, if you credit them, unreasonable restraints of trade" (A. 921-22) and, more specifically as to Oreck's exclusion from Canada, that "arrangements to territorial limitations restricting the territory in which a product may be resold are unreasonable restraints of trade in and of themselves" (A. 928). These instructions were not objected to at the trial nor cited as errors on appeal. See Fed. R. Civ. P. 51.

The fundamental test of all these boycott cases is whether a person by concerted action was deprived of goods or services necessary for that person to compete effectively in the market. The jury in this case properly found Oreck just so deprived. The importance of Oreck's proof concerning the value of and necessity for the Whirlpool-manufactured vacuum cleaners from which it was denied access by the Sears-Whirlpool boycott was clearly spelled out in *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 347-348, 83 S. Ct. 1246, 1252 (1963):

> The concerted action of the Exchange and its members was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over the counter securities market. . . . *A valuable service germane to petitioners' business*

> *and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act.* (emphasis added.)

Since the Sears-Whirlpool boycott is a *per se* violation "inherently subversive of competition," *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 559 (1st Cir. 1974), this Court is compelled to disregard the arguments of Sears and Whirlpool as to, *inter alia*, "the availability of many competitive and alternative products to the consumer and to Oreck itself" (Brief 18), Oreck's alleged failure to "adhere to" unproven "objectives to which it and Whirlpool agreed" and as to which Oreck "reneged," and Oreck's "refusal" to confine itself to a "specified channel of distribution" (Brief 20). *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126 (1972) reaffirms the boycott *per se* doctrine. The language relied upon by defendants in regard to their "analysis of the history of the alleged restraints and the reasons for its adoption" (Brief 17, 20) has to do with an explanation of the rule of reason and has nothing to do with either the holding in *Topco* or in this case.

Defendants' supposed justification runs afoul of the Supreme Court's authoritative statement that it is not a defense in an exclusion case to say that the controversy was a "purely private quarrel" not amounting to a "public wrong proscribed by the Sherman Act" as did the district court in *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 209, 210, 79 S. Ct. 704, 709 (1959). To the contrary, in *Klor's* the Supreme Court made plain that:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances. . . .

> As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. . . . 359 U.S. at 212-13, 79 S. Ct. at 709-10.

But even were Oreck's foreclosure from both the domestic and Canadian markets not to be deemed *per se* violations, Sears and Whirlpool nevertheless could not prevail in their blithe invocation of the "rule of reason".

We remind the Court that this case does not involve a manufacturer's simple replacement of a *single* distributor with no diminution in the number of competitive units in the relevant market. On the contrary, the record demonstrates conclusively that such diminution did occur. Oreck was removed as a competitor of Sears in the distribution of Whirlpool vacuum cleaners, leaving Sears in a permanent monopoly position in that market. Oreck was also removed from the market for vacuum cleaners in general and, as David Oreck testified, "[Oreck has] never done as well as when we had Whirlpool" (A. 425).*

The crucial distinction between the actuality of this case, and the Sears-Whirlpool re-creation of it, is set forth in *Industrial Building Materials, Inc.* v. *Interchemical Corporation,* 437 F.2d 1336, 1342-43 (9th Cir. 1971):

> . . . When a distributor is replaced by another, the public is given a substitute with no diminution in the number of distributors offering services, but when the manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor. Accomplishment of this anticompetitive

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* Defendants' assertion that Oreck regards its current product as superior (Brief 18) is false. David Oreck simply testified that the current product is the *only* one he has and that some consumers have expressly stated their preference for the Whirlpool product (A. 408-09).

> objective by a manufacturer in a dominant market position by means of conspiracy and unfair tactics must surely be proscribed by the antitrust laws.

The distinction is also articulated in *Perryton Wholesale, Inc.* v. *Pioneer Distributing Co. of Kan.*, 353 F.2d 618, 622 (10th Cir. 1965), *cert. den.*, 383 U.S. 945, 86 S. Ct. 1202 (1966):

> . . . In the case at bar the intent of the conspiracy was to eliminate the competitor predominant in the area . . . Such elimination destroys rather than maintains competition, is an unreasonable restraint on trade, and violates the [Sherman Act]. . . .

The very cases cited by defendants themselves make plain that their conspiratorial elimination of Oreck's competition is the type of "arrangement restraining trade or competition" which has consistently been held to violate Section 1. Thus, in *Bushie* v. *Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972) (Brief 16), the Court stated that:

> In connection with refusals to deal, the courts have found to be "arrangements restraining trade" such practices as refusal to deal to eliminate price-cutting dealers . . . to keep new competition out of a market . . . or to further strengthen an already dominant market position. . . . *We recognize, of course, that where such a purpose* [to eliminate competition] *appears, an agreement constitutes actionable conspiracy.* (emphasis added.) 460 F.2d at 119-120.

The distinction between mere substitution of one distributor for another and the anticompetitive narrowing of the distributorship field from two outlets to one is made plain in *Bay City-Abraham Bros., Inc.* v. *Estee Lauder, Inc.*, 375 F. Supp. 1206, 1216 (S.D.N.Y. 1974) (Brief 15), which refers to the above-quoted language of *Bushie*. And in *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F.2d 283

(6th Cir. 1963), also relied upon by defendants (Brief 17), the Court flatly asserted that:

> A refusal to deal becomes illegal under the [Sherman] Act only when it produces unreasonable restraint of trade, such as . . . *elimination of competition* . . . 318 F.2d at 286 (emphasis added).*

Identical language also appears in *Burdett Sound, Inc.* v. *Altec Corp.*, 515 F.2d 1245, 1248 (5th Cir. 1974) (Brief 16), where the Court identifies that action as falling into the special category of "dealer substitution" cases. *Accord, Scanlon* v. *Anheuser-Busch, Inc.*, 388 F.2d 918 (9th Cir. 1968), *cert. denied*, 391 U.S. 916 (1968), where the defendant acted only "to substitute one distributor for another" (338 F.2d at 920) in such a manner as to improve distribution efficiency by combining outlets for premium and popular-priced beers—"a course of conduct which thus increases rather than diminishes competition, benefiting rather than injuring the public" (388 F.2d at 921). At no time in the trial of this action, of course, did defendants make any effort to demonstrate that the elimination of Oreck from the domestic vacuum market and its foreclosure from Canada somehow *increased* competition in these markets. Sears was the preexisting competitor and when it smarted from Oreck's competition Oreck was eliminated.

In short, then, Whirlpool's "refusal to deal" was in fact an elimination of Oreck's competition with Sears and not a business judgment—such as found in *Ace Beer, Bay City-Abraham Bros.*, and *Bushie*—to bring Sears into the market to replace a preexisting exclusive distributorship held by Oreck.

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* Significantly, *Ace Beer*, like *Bushie*, is relied upon by the Court in *Bay City-Abraham Bros.*

The other cases cited by defendants (Brief 15-16) involve merely the replacement of an existing distributorship by another or without any illegal combination "whose objective is to drive [the injured party] out of business." *Ark Dental Supply Co.* v. *Cavitron,* 461 F.2d 1093, 1094 (3d Cir. 1972) (Brief 16). The *Schwinn-Elder-Beerman-Top-All* line of cases (Brief 16) involves innocent business judgments to establish exclusive distributorships and not, as in the case at bar, conspiratorial termination of competition in a market to which access has already been gained.

We suggest to the Court that in those "distributor substitution" cases where the substitution has been approved, the interest of the manufacturer or supplier in choosing his customer was held dominant. Where, however, a distributor is terminated in order not to serve the economic interest of his supplier—and indeed on our facts the choice was made against the economic interest of Whirlpool (pp. 16-17, *supra*)—and the termination is made for the sole benefit of the favored distributor, none of the cases which we have examined suggests that such a termination is justified.

The only relevance of *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S. Ct. 1856 (1967) to the instant case lies in the *per se* violation of Section 1 committed by defendants in foreclosing Oreck from the Canadian market. However, even assuming *arguendo* that the simple *Schwinn* test of legitimate exclusivity—that there are "competitive products readily available" (Brief 20)—is somehow applicable here, defendants' argument is without merit. Hard and abundant facts of record demonstrate that Oreck did not ("readily" or otherwise) find a product fully comparable to the Whirlpool vacuum cleaner in quantity or saleability either during or after Oreck's distributorship tenure (A. 409). At best, the fact that Oreck obtained an

alternative source of supply goes to the issue of damages (pp. 37-49, *infra*) and not to liability.

Thus, the record is uncontroverted that upon termination on December 31, 1971, Oreck was totally eliminated from the market for Whirlpool-manufactured vacuum cleaners, leaving Sears alone in that distribution (A. 508, Tr. 656), and also totally removed from the entire vacuum cleaner market in general.* The record is also clear that Oreck was foreclosed by the Sears-Whirlpool conspiratorial action from the Canadian market long before the 1971 termination and thus has never been able to penetrate this market. In and of themselves, these facts conclusively show the substantial exclusionary impact of the Sears-Whirlpool conspiracy upon Oreck.

But this is merely the first and most patent of the several levels of exclusion imposed upon Oreck. Thus, in regard to the market for vacuum cleaners at large the evidence shows that Oreck's re-entry therein has been partial and incomplete by virtue of the loss of assets related to the Whirlpool trade name and good will (Tr. 607-608). Moreover, the record burgeons with testimony establishing the momentum generated by Oreck from 1963 through 1971, and lost upon termination (A. 201-209, 211-212, 215-219,

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* As to defendants' contention in regard to the number of companies producing vacuum cleaners (Brief 17), it is sufficient to point out that the totality of the evidence adduced at trial shows that Oreck's distributorship arrangement with Whirlpool was unique and that the only alternative source of supply ultimately found by Oreck was nondomestic. Moreover, notwithstanding defendants' reliance upon *Topco* and "the facts peculiar to the business" (Brief 17), defendants indulge in meaningless abstractions concerning "average" sales by Oreck and by the industry at large (Brief 17-18)—totally ignoring, *inter alia*, the extensive testimony from plaintiff's expert witness, Dr. Ritchin (*infra*, pp. 41-42), about the specific and substantial barriers to Oreck's re-entry into the market brought about by the conspiratorial termination. And again, defendants simply ignore Oreck's total foreclosure from the Canadian market.

239, 312-313, 415, 425-427, 445-446; Tr. 496-497; 607-608). David Oreck synthesized this level of exclusion: "We have never done as well as when we had Whirlpool" (A. 425).

The foregoing demonstrates the degrees of foreclosure and exclusion caused directly *since* 1971 by the Sears-Whirlpool conspiracy. Defendants, however, totally ignore the facts of record as to the unreasonable restraints and exclusions placed on Oreck *during* the period of its franchise. These are found with respect to both the Canadian and the U.S. domestic markets. As demonstrated in the Counter-Statement of Facts, defendants imposed severe restrictions upon Oreck's business activities from 1963 through 1971 in the form of restraints on price competition with Sears (pp. 9-11) and exclusion from the mail-order business (pp. 11-13), the private label business (pp. 13-14) and the Canadian market (pp. 14-16), and Whirlpool frequently was guilty of wholly irrational economic behavior (pp. 16-18). The cumulative weight of this evidence, and the substantial exclusionary effect upon Oreck which it caused, provide sufficient foundation for the jury's finding that the Sears-Whirlpool conspiracy was an unreasonable restraint of trade. Accordingly, defendants have failed to meet the stringent burdens imposed upon them in seeking to overturn that finding.

POINT IV

Defendants' antitrust violations caused actual damages of $750,000 to Oreck.

Defendants argue that Oreck has proved neither (a) the fact of damage nor (b) a supportable amount of damages. But the $750,000 award was based upon solid and precise calculations, and if anything was on the low side.

Oreck proved through two experts that the Sears-Whirlpool conspiracy to terminate its distributorship caused the loss of five years' sales of Whirlpool vacuum cleaners between 1971 and 1976 and the loss of 10 years sales of "residual" products (parts and accessories, such as dust bags) following the sale of vacuum cleaners in each of the five years 1971-1976. Oreck's profits came from the sale of these residuals. The decisions of the judge and jury resulted in a $750,000 verdict before trebling ($2,250,000 after trebling) plus $125,000 in attorneys' fees and $5,000 in costs (A. 37-39, 45-46, 957-958).

These figures are low because the judge required the jury to base damages on the extremely conservative assumption that, absent termination, Oreck would have continued its annual sales at the level of the 78,203 vacuum cleaners sold in 1971, the last full year prior to termination (A. 940-41). The judge made this stringent ruling in the face of the testimony of Oreck's expert witness, Dr. Hyman Ritchin, that in his opinion Oreck's sales would have increased each year after 1971 and despite defendants' refusal to introduce any of its own testimony on damages (A. 660 *et seq.*; Tr. 1344-1346).* Furthermore, the jury itself found that Oreck's damages were $750,000 although evidence was introduced from which it could properly have inferred that damages were in excess of $5,000,000 (PX 193 *et seq.*, E173 *et seq.*).

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* Contrary to the false claim in defendants' brief (p. 30) that the judge struck Dr. Ritchin's testimony, the fact is that he carefully permitted the evidence to go to the jury but his instructions assumed that sales would have continued at the 78,203 level (A. 941). Thus, he did not substitute his own opinion as evidence, as defendants claim.

A. *The Fact of Damage: The Termination of Oreck and Its Foreclosure From Canada Clearly Reduced Oreck's Sales.*

"Proof of *some* damage flowing from the unlawful conspiracy" is sufficient to sustain the burden of proving the fact of damage under §4 of the Clayton Act (emphasis in the original). *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 1571 (1969); *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 263, 66 S. Ct. 574, 579 (1946); *Rea* v. *Ford Motor Company*, 497 F.2d 577, 591 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974).

In *Zenith* the Court stated (395 U.S. at 123, 89 S. Ct. at 1576):

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow* v. *RKO Pictures, Inc., supra*, 327 U.S., at 264, 66 S. Ct. at 579.

Elsewhere the *Zenith* Court stated:

> It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. (305 U.S. at 114 n.9; 89 S. Ct. at 1571.)

Defendants here object to the assumption that Oreck would have sold as many vacuum cleaners if Whirlpool had remained Oreck's supplier as it did prior to termination (Brief 28-30). The U.S. Supreme Court has rejected this argument. *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251, 263, 66 S. Ct. 574, 579 (1946). And the argument should be rejected here on the same grounds set forth in *Zenith, supra*—i.e., that the jury was fully entitled to conclude, from the proof of the acts and their tendency to injure plaintiff's business, that damages had in fact resulted to Oreck. This standard was reaffirmed in *Rea* v. *Ford Motor Company,* 497 F.2d 577, 591 (3d Cir.), *cert. denied,* 419 U.S. 868, 95 S. Ct. 126 (1974), where the court rejected defendant Ford's contention that purchasers would not have continued to buy at the higher prices which would have prevailed in the absence of the price-fixing agreement. The Third Circuit stated that this contention was "an unduly restrictive view of causation." *Id.*

Defendants' argument ignores all of Dr. Ritchin's testimony concerning projected vacuum cleaner sales which show 78,203 units a year to be a conservative figure (A. 686-693). It also ignores Judge Owen's ruling that, once 78,203 units in sales had *actually* been achieved, a conservative straight-line projection of this figure for five years is an appropriate and reasonable assumption (Tr. 1345).

Defendants argue that Oreck failed to bear the burden of proving the lack of an alternative comparable substitute and that other sources "supplied Oreck with its requirements" (Brief 27). Defendants completely misconstrue the nature of the damage. While Oreck was indeed damaged because it took time to obtain an alternative source

of vacuum cleaners,* the actual fact of damage lay in the barriers to Oreck's entry into the market with a new and different product (A. 662-678; 696-97). Damage lay in the deprivation of the good will associated with the Whirlpool product and built up in large part by the cumulative effect of Oreck's own advertising (A. 69-72; 211-212; 215-219; 239-243; PX 63, E70). No replacement vacuum cleaner could overcome the preference of Oreck's buying public for the well advertised and reliable Whirlpool machine over an unknown replacement product (A. 409). Thus, damage was caused by the loss of a line of cleaners with the Whirlpool name and of the essential opportunity to make residual sales of parts and accessories for such cleaners** (see pp. 45-48 below).

Defendants' contention (Brief 27) that Oreck "readily obtained another source of supply" after 1971 which it considered "superior" is totally unsupported in the record. The references cited by Sears and Whirlpool (A. 408-409) show only a consumer preference for the Whirlpool machine and a belief by David Oreck that Oreck's unique warranty was superior to the Whirlpool warranty. David Oreck stated unequivocally that in terms of market acceptance he

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* This lag accounted for the drop in Oreck advertising expenditures. Obviously, it was not worth-while to advertise as heavily during a period when it was deprived of its prior source of vacuums and thus had insufficient inventory to respond to any demand created by such advertising. Equally obvious is the fact that the deprivation of Oreck's source reduced the revenues available for advertising. Whether the drop in sales was due exclusively to the loss of the Whirlpool machines or also to a drop in advertising, the loss of the Whirlpool distributorship was the material cause of damage. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 1576 (1969).

** The termination of Oreck also required it to pay a stiff premium for parts to service its existing stock of Whirlpool-manufactured vacuums (A. 448).

was injured by the loss of Whirlpool (A. 425-427; 445-46; Tr. 607-608)* and the jury was entitled to accept this testimony.

B. *The $750,000 Single Damages Awarded by the Jury Were Conservative, Reasonably Estimated, and Fully Supported by the Evidence.*

Plaintiff offered solid proof of damages relying both on the testimony of a well qualified CPA, Mr. Ernest Sommer, and a well known antitrust economist, Dr. Hyman Ritchin. Exhibits and the oral testimony of these experts completely satisfied the damage standards as they have been fixed in antitrust cases.

The measure of damages is the amount necessary to put a party in the exact position it would have been if the violation of law had not occurred. *Perma Research & Development* v. *Singer Company,* 542 F.2d 111, 116 (2d Cir. 1976); *Albrecht* v. *Herald,* 452 F.2d 124, 127-128 (8th Cir. 1971); *Autowest Inc.* v. *Peugeot, Inc.,* 434 F.2d 556, 563-567 (2d Cir. 1970).

An estimate of future profits is a standard measure for the award of damages. *Randy's Studebaker Sales, Inc.* v. *Nissan Motor Corp.,* 533 F.2d 510, 516-517 (10th Cir. 1976); *Rea* v. *Ford Motor Company,* 497 F.2d 577 (3rd Cir.); *cert. denied,* 419 U.S. 868, 95 S. Ct. 126 (1974); *Autowest Inc.* v. *Peugeot, Inc.,* 434 F.2d 556 (2d Cir. 1970). Future profits represent a reasonable measure even if the business has not yet begun operation. *William Goldman Theatres* v. *Loew's, Inc.,* 69 F. Supp. 103, 105-106 (E.D. Pa. 1946), *aff'd,* 164 F.2d 1021 (3d Cir.), *cert. denied,* 334 U.S. 811, 68 S. Ct. 1016 (1948).

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* Furthermore, it is obvious that defendants' argument as to Oreck's new source of supply after 1971 has no bearing whatsoever on the plain *fact* of injury stemming from the foreclosure of the Canadian market prior to that time (A. 119-126, 129-137, 144, 149-154).

A jury is permitted to rest its conclusions as to future profits on estimates made from probable and inferential, as well as direct and positive, proof. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 124, 89 S. Ct. 1562, 1577 (1969); *Bigelow* v. *RKO Pictures, Inc.*, 327 U.S. 251, 264-265, 66 S. Ct. 574, 580 (1946); *Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U.S. 555, 561-564, 51 S. Ct. 248, 251 (1931).

The starting point of plaintiff's damage proof is the undisputed 78,203 unit sales made in 1971. From these are projected Oreck's lost profits (including residual sales). In the extremely conservative approach to damages required by the court, Mr. Sommer premised that plaintiff would repeat the actual 1971 experience of 78,203 unit sales each year through the date of trial, although solid historical evidence and experience as to Oreck's past growth would sensibly support an increase over this figure after 1971. Mr. Sommer then computed gross profits for lost vacuum cleaner sales for each year by multiplying 78,203 by the per-unit price from which was subtracted the cost of goods sold. Mr. Sommer's exhibit (PX 193D, E177) showed a fully projected statement of income for the period 1972 to June 1976.*

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* Plaintiff's Exhibits 106 *et seq.* and 193 *et seq.* rest on uncontroverted evidence consisting of (a) Oreck's sales and financial history while a Whirlpool distributor (PX 106, E 102; PX 193, E 173; PX 193A, E 714); (b) a precise computation of Oreck's profit on residual sales, again drawn from regularly maintained books and records kept by Oreck and also from Whirlpool's own calculations as to the life expectancy of a vacuum cleaner (Tr. 456; 490-493; PX 106A, E 103; PX 106E, E106); and (c) a demonstration of the relationship of the Canadian to the U.S. domestic market (Tr. 466-467). This provides an unshakeable foundation for the calculations of loss of profits which constitute Oreck's damages (PX 193B, E 175; PX 193C, E 176; PX 193D, E 177). The record establishes the accuracy of Oreck's sales projections made during the course of its franchise, and both Oreck and Whirlpool relied on them (Tr. 341; 508; 625).

The heart of the lost profits, however, lay in the loss of residual sales. Both David Oreck and Mr. Sommer testified, on the basis of uncontroverted evidence derived from Oreck's books and records, that during each year in which a vacuum cleaner was used by a customer, that customer continued to buy residuals (i.e. dust bags, parts and accessories) from Oreck (A. 378, A. 732). Although the expected life of a vacuum cleaner as stated by Whirlpool is 15 years (PX 106A, E103), Mr. Sommer made the conservative assumption that residual sales would continue for only 10 years after the sale of a vacuum cleaner (A. 735). David Oreck testified that such sales produced revenues of over $4 per unit (A. 378), and Mr. Sommer calculated that these revenues produced profits of $2.084 per unit sold (PX 106E, E106; A. 730-731).* Defendants made no attempt whatsoever to challenge any of these calculations.

Mr. Sommer's exhibits showed that the sale of 78,203 vacuum cleaner units in each year from 1972 through June, 1976 would have resulted in profits of over $4,500,000 through 1986 (PX 193C, E176; PX 193D, E177). While sales of vacuum cleaners alone would show losses, these would be more than overcome by profits from the sales of residuals, as is demonstrated by the uncontroverted evidence of Oreck's historical business experience during the course of its franchise from 1963 through 1971. The estimation of future profits on the basis of the "after market" or market for residuals is entirely proper. See, *e.g.*, *Hoefferle Truck Sales* v. *Divco-Wayne*, 523 F.2d 543, 550-551 (7th Cir. 1975).

The jury was also presented with PX 193E and PX 193F which provided a basis for mitigation of damages by deducting residual-sales-profits that would result from the

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* See pp. 47-48, *infra*, for explanation of how Mr. Sommer calculated profits from residual sales.

actual sales of vacuum cleaners by Oreck in the period 1972-1976. The final award of $750,000 shows that the jury discounted damages substantially below the figures reflected in plaintiff's exhibits.

Defendants complain that plaintiff should have used actual residual profit figures for the period 1972–June 1976 for purposes of mitigation (PX 193E, E178).* However, these figures would have been tainted by the effect of Oreck's wrongful termination. The lower volume of actual residual sales in 1972-76 caused by the termination would result in a higher fixed cost and therefore a lower profit per residual. If such lower actual profits were deducted from projected lost profits, plaintiff's claim would have been increased. Plaintiff sought to avoid inflation of its damages by using a profit per residual in PX 193E based on sales experience prior to termination. In short, such use of actual residual profit figures as suggested by defendants would have resulted in larger, not smaller, damages.

Mr. Sommer's and Mr. Oreck's estimates followed long-established and consistently approved principles of computing damages, see, *e.g., Randy's Studebaker Sales, Inc.* v. *Nissan Motor Corp.*, 533 F.2d 510, 517 (10th Cir. 1976); *Shor-Line Motors, Inc.* v. *American Motors Sales Corp.*, 543 F.2d 601 (7th Cir. 1976); *Autowest Inc.* v. *Peugeot, Inc.*, 434 F.2d 556, 563-567 (2d Cir. 1970). In making such an estimate as to ten-year profits, the jury is permitted to consider the estimates of plaintiffs' own officers concerning damages and future projections (*id.*, at 563-567).

Defendants claim, contrary to the record, that "Sommer did not consider any of Oreck's expenses incurred

* PX 193E computes the residual profits from actual units sold in the period 1972–June 1976 by multiplying the actual number of units sold by Oreck during this period by the residual profit per unit as derived from Oreck's sales experience through June 1972.

in connection with the sale of residuals" and thus assumed that "Oreck had no overhead" (Brief 31). In fact, Mr. Sommer testified that he took into consideration such expenses (A. 733, 749).

However, perhaps defendants' most flagrant misstatement of the record is their wild assertion that plaintiff's projections "failed to deal with the actual state of the market place," "ignore competition" and "ignore price and profit fluctuations" (Brief 34). The jury heard Mr. Sommer's testimony that Whirlpool price increases would have been passed on to consumers (A. 745-746, 759) and that increased operating costs were in fact reflected in the preparation of damage exhibits (A. 753-756). The jury further weighed extensive testimony from Mr. Sommer as to inflation and other economic conditions after 1972 (A. 759-762) and heard corroborative testimony from Dr. Ritchin (A. 699-701). Statistical evidence as to industry sales since 1971 was also available to the jury (PX 107, E111; PX 108, E112; A. 382-384). The jury obviously took these factors into account in reducing damages from $4,500,000 to $750,000.*

Sears and Whirlpool cite *Volasco Products Company* v. *Lloyd A. Fry Roofing Company*, 308 F.2d 383, 391 (6th Cir. 1962), *cert. denied*, 372 U.S. 907, 83 S. Ct. 721 (1963), as an additional reason for reversal. In *Volasco* the Sixth Circuit rejected the testimony of the president of the plaintiff that, absent injury, he believed that his sales of felt would have increased by 247% because his sales of another

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* Defendants also claim (Brief 43) that Mr. Sommer ignored Oreck's books and records. Mr. Sommer's testimony clearly shows that he studied the books and records through June of 1972 (A. 740) and examined the tax returns for subsequent years (A. 893). Mr. Sommer also presented the actual results of Oreck's operations subsequent to 1971 for the jury to consider along with all other testimony.

product, asphalt, increased by that percentage a year earlier. The court rightly pointed out that no relationship had been established between increases in sales of asphalt and felt.

The facts before this Court are completely different. Mr. Sommer, an independent expert, established in detail the interlocking relationship between vacuum cleaners used by Oreck's customers and sales of residuals. He took the total number of vacuum cleaners actually sold by Oreck through the eight fiscal years prior to termination. In 1972 all of these were outstanding in the hands of customers and producing residual sales because Oreck had not been in business as long as the 15-year expected life of a vacuum cleaner (PX 106A, E103) or even the 10-year period conservatively used by Mr. Sommer.

By dividing these units outstanding into the actual dollar sales of residuals for the year 1972, and multiplying by the net profit percentage for residuals in 1972, Mr. Sommer computed the residual profit for each unit used by a customer of Oreck's. The result was a figure of profit for residual sales per year per unit (A. 731-733; PX 106E, E106). While the residual sales figure for 1972 reflected sales only in that year, this represented the most accurate calculation because it was the most recent year before the full effect of termination was felt, and because there were more units outstanding in 1972 (e.g., 8 years' worth) than in any previous year. No rebuttal evidence was introduced, nor was Mr. Sommer's testimony on this matter damaged by cross-examination.

Defendants further object to plaintiff's recovery of damages for lost sales of residuals on the basis of *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir.), *reh. denied*, 509 F.2d 758 (5th Cir. 1975). There the Fifth Circuit stressed that plaintiff's damages were "wholly

based upon a decline in bank deposits of about $7,000 [53%] between the months of June and July 1966" (509 F.2d at 759). On that basis alone, an "expert" witness applied the 53% multiplier to subsequent bank deposits for five years. On rehearing, the court emphasized that there was no basis for assuming that deposits were in any way reflective of the sales of all products.

The instant case stands on an entirely different footing: Damages were *not* predicated on an unrepresentative one-month decline in bank deposits. Moreover, the Orecks were in the business of selling vacuum cleaners and their accessories and replacement parts which are directly and demonstrably related to the sale of vacuum cleaners (A. 378, 732).

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Prod. Co.*, 284 F.2d 1, 34 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19, 82 S. Ct. 1130 (1962), also cited by defendants (Brief 36), involved testimony—by an accountant not familiar with the relevant industry—based on stale data (when more recent data was available). The court found that the expert's conclusions were based on conditions contrary to fact. There is no parallel here. The calculations of Mr. Sommer were based upon Oreck's *actual* operating figures in the year immediately prior to the date of termination by Whirlpool. Similarly, all the exhibits prepared by plaintiff's experts were based on the most recent and reliable data for the period immediately prior to termination.

CONCLUSION

For the foregoing reasons plaintiff-appellee urges the Court to affirm the trial court's denial of the post-trial motion of defendants-appellants seeking judgment notwithstanding the verdict or a new trial.

Dated: New York, New York
May 2, 1977

Respectfully submitted,

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STATE OF NEW YORK,
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Joseph Boselli , being duly sworn, deposes and says, that on the 2nd day of May 19 77 , at 3:30 o'clock P. M. he served the annexed Brief for Plaintiff-Appelle in re: Oreck Corp. v. Whirlpool Corp, et al No. 76-7631

upon See Second Sheet

Esq(s)., Attorney(s)

for See Second Sheet

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that being the address designated in the last papers served herein by the said attorney. Joseph Boselli

Sworn to before me this 2nd day of May 19 77

John Alusick

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